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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1191

HOWARD GISH and JACQUELYN GISH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit for this case below, *United States v. Gish,* is reported at 559 F. 2d 572 (9th Cir. 1977), *rehearing and rehearing en banc denied,* 559 F. 2d 572 (9th Cir. 1977). A copy of this opinion is appended to this Petition at Appendix, pages la-6a. The opinion

of the United States District Court for the District of Alaska, *United States v. Gish,* Civil No. F-25-76 (D. Alaska, July 23, 1976), is unreported. A copy of this opinion is appended to this Petition at Appendix, pages 7a-9a.

II. JURISDICTION OF THIS COURT.

Petitioners respectfully invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1) (1970). Judgment of the Court of Appeals was rendered August 23, 1977. Petitioners sought a rehearing and a rehearing *en banc* within the permitted time period. An order denying the petition for a rehearing and suggestion of appropriateness of rehearing *en banc* was issued on November 22, 1977.

III. QUESTION FOR REVIEW.

The question presented for review is the following:

Whether the Small Business Administration may seek a deficiency judgment for the unpaid balance of a disaster loan, where the Small Business Administration voluntarily, intelligently, and specifically invokes a state statutory scheme permitting it to liquidate the security for the debt nonjudicially and where that state statutory scheme contains a particular debtor protection device forbidding deficiency judgments where creditors proceed thereunder to foreclose collateral nonjudicially.

IV. THE STATUTES AND REGULATIONS WHICH THE CASE INVOLVES ARE THE FOLLOWING:

15 U.S.C. 634(b)(4):

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

* * * *

> (4) pursue to final collection, by way of compromise or otherwise, all claims against third parties assigned to the Administrator in connection with loans made by him. This shall include authority to obtain deficiency judgments or otherwise in the case of mortgages assigned to the Administrator. * * *

13 C.F.R. §101.1(d)(2):

> (2) Instruments evidencing a loan, obligation of security interest in real or personal property payable to or held by the Administration or the Administrator, such as promissory notes, bonds, guaranty agreements, mortgages, deeds of trust, and other evidences of debt or security shall be construed and enforced in accordance with applicable Federal law.

13 C.F.R. §101.1(d)(4):

> (4) Any person, corporation, or organization that applies for and receives any benefit or assistance from SBA, or that offers any assurance or security upon which SBA relies for the granting of such benefit or assistance, shall not be entitled to claim or assert any local immunity to defeat the obligation such party incurred in obtaining or assuring such Federal benefit or assistance.

A.S. § 34.20.070(a):

> Sale by trustee. (a) If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken,

the trustee, in addition to the right of foreclosure and sale, may execute his trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court.

A.S. § 34.20.100:

Deficiency judgment prohibited. When a sale is made by a trustee under a deed of trust, as authorized by §§ 70 - 130 of this chapter, no other or further action or proceeding may be taken nor judgment entered against the maker, his surety or guarantor, on the obligation secured by the deed of trust for a deficiency.

V. STATEMENT OF THE CASE.

In 1967, the Small Business Administration (SBA) made a $147,000.00 disaster relief loan, pursuant to its authority under 15 U.S.C. §636(b) (1970), to Howard and Jacquelyn Gish for the repair of flood damage to rental properties owned by the Gishes. The loan was secured by a deed of trust on three parcels of land owned by the Gishes. The loan amount was increased to $160,000.00 in 1969.

Paragraph six of the deed of trust included the following: "Trustor shall be liable for and agrees to pay any deficiency."

Paragraph twelve of the deed of trust stated:

The undersigned further agrees that, pursuant to Part 101 of the Rules and Regulations of the Small Business Administration, this instrument is to be construed and enforced in accordance with the applicable Federal Law. The undersigned hereby waives any local immunity from the performance of any obligation hereunder.

The Gishes made three requests that the SBA defer their loan payments. The SBA agreed to the deferrals. However, in February 1970, the Gishes having paid a total of $3,811.15 on the loan, the SBA accelerated the note and made a demand on the Gishes for payment. Following an ensuing six month deferral of loan payments to enable the Gishes to arrange a suitable financing plan, the SBA, as beneficiary under a deed of trust on real estate, exercised its statutory right under the laws of Alaska to execute the trust by sale of the realty nonjudicially, that is, without first securing a decree of foreclosure and order of sale from a court.

The real property collateral was sold at a summary foreclosure sale, pursuant to the requirements of the Alaska statutory scheme, A.S. §§ 34.20.070-135, on September 20, 1973. The SBA purchased two parcels for a total of $44,000.00.[1]

The third parcel was purchased by a private party for $16,000.00. After crediting the net proceeds to the loan balance, approximately $121,000.00 of the loan obligation remained unpaid.

Approximately two years after the foreclosure sale, in August 1975, the SBA filed the instant action against Petitioners to recover the unpaid balance of the loan. The Gishes defended on the ground that the Alaska statutory scheme invoked by the SBA to realize upon the collateral

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[1] The SBA subsequently sold both of these properties. One, sold one month after the foreclosure sale, yielded the SBA a $1,000.00 profit. The second, sold three months after the foreclosure sale, resulted in a profit to the SBA of approximately $5,800.00.

nonjudicially barred any action for a deficiency judgment. Particularly, the Gishes relied upon A.S. § 34.20.100 which forbids deficiency judgments upon obligations secured by deeds of trust where the collateral has been sold in a summary foreclosure sale pursuant to a power of sale reserved in the deed of trust.

Upon Petitioner's motion for summary judgment, the United States District Court for the District of Alaska ruled, "that a deficiency judgment would be barred by the principles enunciated in *United States v. Yazell,* 382 U.S. 341 (1966) . . . ."

The District Court further stated three additional reasons why *United States v. Yazell* was controlling and why SBA should be denied a deficiency judgment. First, the Court noted that the SBA could have proceeded by foreclosure, that is judicially, and therefore could have recovered any deficiency under the Alaska statutes, citing A.S. § 09.45.170. Thus, the Court found, there did not have to be, and there was no, danger to the federal fisc.[2]

Second, the Court found that the particular debtor protection elements of the statutory scheme may not be waived as a matter of state law, and, to the extent that federal law would allow such a waiver, there existed no overriding federal interest permitting or requiring the SBA to extract or enforce such a waiver.

Third, in the circumstances of this case, where the SBA lent directly to the Gishes and the SBA was the direct secured party under the deed of trust, the Court found no federal statute permitting the recovery of the deficiency judgment.

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[2] There also is no question of the SBA's right and authority to proceed on the note itself to recover the full obligation.

On behalf of the SBA, the United States appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed, finding the District Court's reliance on *United States v. Yazell,* as interpreted and applied in *United States v. MacKenzie,* 510 F.2d 39 (9th Cir. 1975) (en banc),

> unwarranted because of distinguishing facts in the instant case. Each of the critical factors absent in prior cases, *i.e.*, contractural provisions, federal statute and administrative regulations, is present here and they compel an opposite result.

United States v. Gish, supra, 559 F. 2d at 573. The Court further ruled, *id.* at 575:

> A consistent application of the statute in all jurisdictions is necessary to effectuate the underlying Congressional goals. This requires that the SBA be allowed to recover deficiencies whenever federal law applies and there has been a default on a loan secured by real property.

Petitioners sought a rehearing and a rehearing *en banc* of the Court of Appeals. These requests were denied, and this Petition followed.

VI. REASONS FOR GRANTING THE PETITION.

A. The Court of Appeals Misconstrued and Misapplied a Federal Statute and Federal Regulations.

1. The Court of Appeals Erred In Its Application of 15 U.S.C. §634(b) (4) (1970).

The Court of Appeals held that the existence of a federal statute, allegedly governing the transaction and law suit at issue, distinguished this case from *United States v. Yazell* and authorized the deficiency judgment

despite the contrary statutory provisions in Alaska law. 15 U.S.C. §634(b)(4) authorizes the Administrator of the SBA to:

> pursue to final collection, by way of compromise or otherwise, all claims *against third parties assigned to the Administrator* in connection with loans made by him. This shall include authority to obtain deficiency judgments or otherwise *in the case of mortgages assigned to the Administrator.* [Emphasis added.]

Neither the government, in its brief in chief or reply brief in the Court of Appeals, nor the Court of Appeals itself, supplied any analysis for the conclusion that this statute governs. On its face, the statute pertains only to claims "against third parties assigned to the Administrator" and empowers the SBA to seek deficiency judgments only "in the case of mortgages assigned to the Administrator". It was undisputed below that the Gishes were not "third parties" and that the claim of the SBA and the security interest held by it were not "assigned to the Administrator." The Gishes borrowed directly from the SBA and conferred the security interest directly upon the SBA as beneficiary under the deed of trust. "Assigned" is a precise term of art, and there is no indication in this statute that its meaning is to be anything other than the expected, logical, technical meaning. The reference to "third parties" supports this reading of the statute.

Moreover, precedent shows clearly the reluctance of this Court to give extended, contorted meaning to statutes dealing with federal security interests in real property. This Court has scrutinized statutes in analogous circumstances, and has applied a stringent analytical framework to claims of federal preemption or abrogation of state statutes. For example, in *United States v. Brosnan,* 363 U.S. 237 (1960), in ruling that state law governing divestiture of federal tax liens was to be adopted as federal law, the Court meticulously examined the federal statutes at issue. The Court found that the statutes were "purely permissive in tenor", that is, found no "federally imposed requirement that there be any judicial sale at all." *Id.* at 246. As in the instant case, the "statutes on their face evidence no intent to exclude otherwise available state procedures", *id.* The Court concluded that Congress, therefore, "must have recognized the possibility that state procedures might affect federal liens." *Id.* at 247.

The Court explained its reason for its demonstrated disinclination to disrupt, indeed supplant, state procedures and remedies pertaining to security interests in real property. The reasoning deserves quotation at some length.

> We nevertheless believe it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is "uniformity, as far as may be." . . . However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject

> ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule.

Id. at 241-42 (citations omitted).

Furthermore, the statute allegedly controlling is not of the type specific in nature and admitting of no deference to state law, yet alone one which precludes the analytical paradigm imposed by *United States v. Yazell, supra,* and other cases to be discussed below. *Compare, e.g., United States v. Equitable Life Assurance Society,* 384 U.S. 323 (1966); *United States v. Waddill, Holland and Flinn, Inc.,* 323 U.S. 353 (1945). Rather, the statute at issue merely is the agency's enabling statute, general and precatory in nature, a simple authorization to the agency to perform its basic functions. *See United States v. Yazell, supra; Cf. D'Oench, Duhme and Co. v. FDIC,* 315 U.S. 447, 455-56 (1942); *id.* at 464 (Frankfurter, J., concurring). *See also United States v. Standard Oil Co.,* 332 U.S. 301, 310, 316 (1947).[3]

2. The Regulations Relied Upon Do Not Support The Decision.

The Court of Appeals relied upon two regulations of the SBA, reiterated in substance in the operative deed of trust. The first regulation, 13 C.F.R. §101.1(d)(2), provided that all loan documents "shall be construed and enforced in accordance with applicable Federal law."

[3] The SBA performed proprietary, commercial functions. Manifestly, it is not a pervasive regulatory agency. *Compare, e.g.,* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). *See* United States v. Yazell, *supra,* 382 U.S. at 348: an individual loan from the SBA is not a nationwide act emanating in a single form from a single source.

This does little more than repeat the obvious, as this Court has declared numerous times. *See, e.g., United States v. Yazell, supra,* 382 U.S. at 356-57; *United States v. Brosnan, supra,* 363 U.S. at 241-42. The regulation goes no further than to beg the question of what is the applicable federal law. This is especially so in the instant case where the particular regulations pertaining to the disaster loan program, 13 C.F.R. Part 123, make no mention of personal judgments or full realization of the debt. *See, e.g.,* 13 C.F.R. §§123.3(a) and (b). Rather, they contain the regulatory admission, *id.* § 123.6 (a), that:

> The Small Business Act, as amended, contains no specific requirements with respect to collateral as security for a disaster loan, nor has SBA established any rigid rule in regard to collateral. However, . . . SBA will give consideration to the moral risk involved . . . .

Compare the regulations for business loans, 13 C.F.R. Part 122, which make references, both tacit and explicit, to the requisite security, the type of risk which SBA is willing to incur under that program, credit requirements, and security liquidation procedures.

The other regulation relied upon by the Court is 13 C.F.R. §101.1(d)(4) which declares that no recipient of SBA assistance shall be "entitled to claim or assert any local immunity to defeat the obligation." The deficiency judgment prohibition, a substantive element of the statutory scheme voluntarily and knowingly invoked by the SBA, permitting a mortgagee to proceed against collateral nonjudicially, is not an immunity in the traditional, technical usage of that term. Nor does the deficiency judgment prohibition operate to defeat the obligation. At best, it merely limits the amount which a mortgagee may collect if it chooses to proceed under this statutory

allowance. It is, in fact, the law of Alaska that the limitation of A.S. § 34.20.100 is not "an obligation which the debtor is not required to pay", *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 556 (Alaska 1966).[4]

In short, Petitioners contend that the Court of Appeals misapplied the statute and regulations cited.

B. The Decision of the Court of Appeals is Contrary to Precedent of This Court.

The Court of Appeals determined that this case was excepted from the rule and the frame of analysis set forth by this Court in *United States v. Yazell.* The reason was that the instant case contained "distinguishing facts", that is, a contractual provision, a federal statute, and administrative regulations not present in *Yazell.* Without doubt, the enabling statute which the Court of Appeals held was a distinguishing feature existed in *Yazell.* The first regulation cited merely incorporated the basis of the judicial analysis obtaining in all similar cases, that is, the departure point of the determination of the applicable federal law. The second regulation was of questionable application at best, and, in any event, was not the "specific agency regulation" providing "a preferred right" which *Yazell* requires, 382 U.S. at 349.

However, in its summary dismissal of *Yazell* as binding precedent, the Court of Appeals neglected the pith, and true mandate, of the case. That is, the meticulous analysis of whether there is a sufficient, weighty federal inter-

[4]The SBA indeed did foreclose on and dispose of the security, realizing on the debt to the extent permitted by law. It is difficult to see how the Gishes' obligation was both enforced to their detriment and defeated at the same time, particularly where, up until its choice of the manner of seeking satisfaction, the SBA had full rights to proceed against the Gishes for the full amount of the debt, both on the note and on the security agreement.

est and federal purpose embodied in the program at issue, "which requires overriding a state law dealing with . . . intensely local interests . . . ." *Id.* at 349; *United States v. Gish, supra,* 559 F.2d at 574 n. 1.[5]

When such an issue is presented, this Court has imposed a mandatory analytical framework. The federal policy and interests must be identified and scrutinized, as must those of the state. Thereafter, a detailed balancing must occur to determine whether the state law or policy is to be adopted, under the circumstances, as the governing federal law. If the state law is rejected, the Court then must proceed to determine, based upon the various interests at stake, what the appropriate federal law should be. *United States v. Yazell, supra,* 382 U.S. at 348-49; *id.* at 358 (Harlan, J., concurring); *United States v. Shimer,* 367 U.S. 374, 377-85 (1961). *See United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 593-600, 602-04 (1973).

No such analysis was attempted, yet undertaken, in the instant case. Rather, the Court of Appeals merely held that, because of the ostensible distinguishing features, the "reliance" of the District Court upon *Yazell* was "unwarranted", *United States v. Gish, supra,* 559 F.2d at 573.

As this Court stated in *Yazell,* 382 U.S. at 352, state interests in matters of long-standing and intense state control

[5] That classification of real property liens and the liquidation of real property as security for a loan are "intensely local interests" cannot be gainsaid. *See* United States v. Brosnan, *supra,* 363 U.S. at 241-42. *See also* Gelfert v. National City Bank, 313 U.S. 221, 231 (1941); Brine v. Insurance Co., 96 U.S. 627, 634 (1877); United States v. Stadium Apartments, Inc., 425 F.2d 358, 367-70 (9th Cir. 1970) (Ely, J., dissenting); United States v. Caprice, 427 F. Supp. 1035, 1038 (D.N.J. 1976).

> should be overriden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

This analysis is particularly apt in the instant situation where the government made a knowing and conscious choice to seek satisfaction of the obligation by a specific statutory route, complying in all respects (but the one at issue) with the state statutory scheme, which on its face limited the government's right to seek a deficiency judgment. Other means, such as judicial foreclosure and seeking judgment on the obligation, were clearly and unquestionably available to the government and, if pursued successfully, would have entitled the government to a judgment for the full amount of the alleged liability. Without doubt, deference to the limited policy embodied in the statute would not have inflicted major damage on the federal interests served by the disaster loan program.[6]

The Court of Appeals ruled further, 559 F.2d at 575, that a "consistent application of the statute in all jurisdictions is necessary to effectuate the underlying Congressional goals." The Court then held, based upon this summary premise, that the need for uniformity required that the SBA be permitted to recover deficiencies. This Court, however, has ruled to the contrary.

In *United States v. Yazell, supra,* 382 U.S. at 348, the Court held that an SBA loan transaction "was not a nationwide act of the Federal Government, emanating in a single form from a single source." (footnote omitted).

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[6] Indeed, such deference well may have accomodated the federal interests in aiding victims of natural disasters by not exacerbating the effects of the disaster through the imposition of the deficiency liability.

At this point, the Court directed that an SBA loan transaction be contrasted with *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), which involved the rights and duties of the United States on its commercial paper, and *United States v. Helz,* 314 F.2d 301 (6th Cir. 1963) which arose under the National Housing Act and in which the federal agency did not negotiate with individual applicants. *United States v. Yazell, supra,* 382 U.S. at 348 n. 15.

Additionally, *id.* at 347 n. 13, the Court cited and quoted with approval *Bumb v. United States,* 276 F.2d 729, 738 (9th Cir. 1960), rejecting the notion that the nationwide operation of the SBA raises a presumption of the desirability of a uniform federal rule, and farther rejecting the defense that this amorphous need for uniformity excused the SBA from complying with a California bulk sales statute. *Cf. United States v. Little Lake Misere Land Co., supra,* 412 U.S. at 607 (Rehnquist, J., concurring); *Gelfert v. National City Bank,* 313 U.S. 221, 232-33 (1941); *United States v. Chappell Livestock Auction, Inc.,* 523 F.2d 840, 841 (8th Cir. 1975) (en banc).

C. The Decision of the Court of Appeals Conflicts With Decisions of Other Courts of Appeals.

The Court of Appeals for the Sixth Circuit faced an issue similar to the instant one in *Weinstein v. United States,* 511 F.2d 56 (6th Cir. 1975). At issue there was a provision of the statutes of the State of Ohio prohibiting a deficiency judgment where a mortgagee sold or otherwise disposed of collateral before judicial foreclosure of the security interest. The statute also barred waiver of the deficiency judgment prohibition by a debtor.

Mr. and Mrs. Weinstein were unconditional guarantors, though not principal debtors, of a mortgage indebtedness assigned to the SBA.[7]

Included in the guaranty agreement with the lender was a waiver by the Weinsteins of notice with respect to the sale of the collateral pledged to secure the loan, notice which the Ohio statute decreed was the only route by which a lender, or its assignee, could obtain relief from the otherwise flat bar to deficiency judgments.

Upon the loan's being in default, Mr. Weinstein, acting individually, agreed to a sale of the collateral and executed a specific waiver of the notice required under the Ohio statute. Mrs. Weinstein did not sign the waiver.

Upon suit by the SBA against the Weinsteins on their guaranty, the guarantors defended on the ground that the SBA was barred from recovery of any deficiency because of its failure to comply with the notice requirements of the Ohio statute.

In deciding the issue, the Sixth Circuit stated categorically, *id.* at 58:

> The SBA is required to comply with state laws enacted to protect its citizens where such compliance does not interfere with a federal interest. *United States v. Yazell,* 382 U.S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966).[3]
>
> [3] Of course there is no question that such compliance was required if the sale in this case was by the Capital National Bank rather than the SBA. See note 2, *supra.*

The Court of Appeals then pursued an extensive analysis of Ohio law, concluding that Mr. Weinstein was liable

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[7] Note that the Weinsteins, as third parties to the agreement between the SBA and the lender, and the SBA, as assignee of the indebtedness, fit the terms of 15 U.S.C. § 634(b)(4), unlike the circumstances of this case.

for a deficiency, but that Mrs. Weinstein was not, as a matter of federal law.

Undeniably, the basis upon which the Ninth Circuit summarily dismissed *Yazell* as precedent, that is the existence of a statute, regulations and contractual provision, existed in *Weinstein*. In fact, the statute and regulations obtaining at the time in *Weinstein* were precisely the same as those in *Gish*. The contractual provision, while not identical, was substantially similar in its effect, purporting to deprive the debtor of the protection of a statutory deficiency judgment prohibition. The Sixth Circuit, however, did not find these provisions weighty enough to counter the result, yet alone the analytical framework, of *Yazell.* Petitioners respectfully submit that the Ninth Circuit's decision, both in form and in substance, is directly at odds with that of the Sixth Circuit which, Petitioners contend, correctly decided the matter before it.

The Ninth Circuit's decision also is at variance with decisions of the Court of Appeals for the Fifth Circuit. In *Gish,* the Court ignored the fact that several other statutory and common law routes were open to the SBA for recovery of the alleged indebtedness. The agency could have sought judicial foreclosure and would not have been barred from seeking recovery for any deficiency. Likewise, it could have sued on the note itself and obtained a judgment for full recovery. However, it chose the one means available to it whereby its recovery was limited. The Court of Appeals paid no heed, however, to this affirmative, knowledgeable election of remedies by the SBA.

The Fifth Circuit has opined that, in analogous circumstances,

> The rights of SBA to purchase at the sale, and its obligation as a mortgagee purchasing the security, depend upon the terms of the mortgage itself, *the type of sale*, and *questions of choice of law* . . . [8]

Frederick v. United States, 386 F.2d 481, 487 (5th Cir. 1967) (emphasis added). This sentiment was endorsed by that Court in *United States v. Terrey*, 554 F.2d 685, 694 (5th Cir. 1977), when it stated that SBA obligations vary "with the approach the agency used to collect . . . The agency, as well as the bank, could have disregarded the collateral altogether and sued Terrey directly for the full amount of the debt."

The Tenth Circuit similarly has taken the posture that when the SBA chooses to invoke a particular state procedure to protect the financial interests of the government, that procedure applies in full. *Lilygren v. United States*, 370 F.2d 366, 368 (10th Cir. 1966).

The disposition sought by Petitioners also comports with the application of *Yazell* to the analogous Farmers Home Administration programs. *United States v. Chappell Livestock Auction, Inc., supra*, 523 F.2d at 841.

D. The Court of Appeals Decided an Important State Question in a Manner Contrary to State Law.

The District Court ruled that as a matter of state law the deficiency judgment prohibition of A.S. §34.20.100 could not be waived by the debtor. The Court further decided that there existed no overriding federal interest

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[8] Both opinions in Frederick, the majority and the dissent, assumed that state law applied as federal law in the SBA transaction at issue. 386 F.2d at 485 n.6, 487; *id.* at 492 (Wisdom, J., dissenting). *See also* Sitton v. United States, 413 F.2d 1386, 1389 (5th Cir. 1969).

requiring that the state interest in debtor protection be subordinate and, therefore, waivable. The Court of Appeals, on the contrary, felt that:

> There is no reason why these appellees should not be bound by the inserted clauses [presumably constituting a waiver of the deficiency judgment limitation] which provide that federal law will govern, that the parties waive any local immunity, and that the "[t]rustor shall be liable for and agrees to pay any deficiency."

559 F.2d at 574.

The Court of Appeals gave no reason and cited no precedent for overturning the District Court on this point. Indeed, this issue was neither briefed nor argued before the Court. The decision of the Court of Appeals is directly contrary to state law (and federal policy) as found by the District Court. Moreover, it is contrary to the general notion of most states, and most courts, that specific debtor protection devices, particularly regarding deficiency judgment limitations and redemption rights, in the area of mortgages and deeds of trusts, are not waivable. *See, e.g., California Bank v. Stimson,* 89 Cal. App. 2d 552, 201 P.2d 39, 41 (1949); *Weinstein v. United States, supra,* 511 F.2d at 57-58.

Furthermore, the precise statutory provision at issue here was before the state courts of Washington in *State ex rel. Lonctot v. Sparkman and McLean Co.,* 16 Wn. App. 402, 556 P.2d 946 (1976), *review denied,* 89 Wn. 2d. 1002, ____ P.2d ____ (1977). The Court of Appeals of Washington held:

> that the trial court was correct in deciding that Alaska law prohibiting deficiency judgments in non-judicial foreclosures is applicable. Having made its election and acted upon it, the SBA cannot now

> claim a deficiency—it deliberately chose to forego a judicial sale proceeding which would have entitled it to a deficiency.

556 P.2d at 949. In a footnote immediately preceding the holding, the Washington Court stated that this Court, in *Yazell*, "answered in the affirmative the question whether federal law should defer to state laws protecting debtors when the government seeks to recover a debt generated by an SBA loan." *Id.* at n. 3.

E. The Effect of the Decision of the Court of Appeals Upon the Laws of Real Property and Debtor-Creditor Relations is Confusion, Uncertainty and Unpredictability.

The effect of the decision of the Court of Appeals upon state law is to endow well settled principles of real property law and debtor-creditor relations with unnecessary confusion, uncertainty, and unpredictability, in an area in which solicitude for local interests long has been practiced by this Court. *See, e.g., United States v. Brosnan, supra,* 363 U.S. at 241-42. The Ninth Circuit itself would be a fount of confusion in this area if this decision is allowed to stand, for the Court has decreed that in some instances the SBA must accede to deficiency judgment limitations in state debtor protection statutes, *e.g., United States v. MacKenzie, supra,* and in this instance the SBA need not. The differences in the opinions of the Courts of Appeals in this matter enhance this uncertainty.

While the effect of this decision will not be limited to the disaster loan program of the SBA, this program does offer a particular example of the corrosive effect of the decision upon state mortgage and credit laws. Under the

program, *see* 15 U.S.C. §636(b) and 13 C.F.R. §123.1(c), the SBA has authority to participate in loans and to guarantee loans in addition to its direct lending power. In the former circumstances, *i.e.*, participations and guarantees, the lead lenders and lenders, respectively, are private institutions. If a private institution were to lend money to a disaster victim and secure its loan with a deed of trust on real estate, that institution would be prohibited, absolutely, from obtaining a deficiency judgment if it were to sell the security nonjudicially under a reserved power in a deed of trust. Were SBA, as subrogee under the guaranty program, to succeed to the rights of such lender, the courts would be presented with the anomalous and seemingly unconstitutional proposition of the revival of the once barred liability for a deficiency judgment. More incongruous would be the situation where the SBA is a percentage participant. In that instance, under this decision the lead lender would be precluded from obtaining a deficiency judgment on its percentage, but apparently the SBA would not be so barred. Confounding questions such as whether the SBA's action for a deficiency judgment in such circumstance, if allowed, would apply to only its percentage or the entire debt would place federal courts in the posture of having to decide intricacies of real property and mortgage law long reposed in the jurisdiction of the states. Moreover, this decision on its face raises the distinct possibility, indeed probability, that long settled concepts of mortgage law such deficiency judgments, subrogation, guaranty, and participation will be given novel, distorted, disruptive meanings when the government is involved. This will be particularly unsettling in guaranty and participation circumstances, where government entry may be subsequent to the initial loan and security transaction.

The *Gish* decision, if allowed to stand, will invite, in fact compel, further and repeated federal court litigation and the attendant extended injection of the federal courts into state laws and procedures. Further, as the instant case shows, it invariably will result in at least two laws on the same subject in each state and, concomitantly, raise significant doubts about the force and effect of other laws purposefully availed of by the United States Government in the individual states. Such a result is of dubious desirability. *Cf. generally* Note, Federal Courts—Choice of Controlling Law in Cases Involving Federally Insured Mortgages, 49 N.C.L. Rev. 358, 366-67 (1971).

VII. CONCLUSION.

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Howard GISH and Jacquelyn Gish, his wife, Defendants-Appellees.

No. 76-3046.

United States Court of Appeals,
Ninth Circuit.

Aug. 23, 1977.

Rehearing and Rehearing En Banc
Denied Nov. 22, 1977.

Before WRIGHT, CHOY and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

The government appeals from the dismissal of its action for a deficiency judgment which the district court held barred by an Alaska statute prohibiting recovery of such judgments following a nonjudicial foreclosure.

The Small Business Administration (SBA) made a $147,000 disaster relief loan to Howard and Jacquelyn Gish in 1967 as a result of flood damage to their rental properties. The loan was secured by deeds of trust on three parcels of property and the terms of the deeds were incorporated in the note by reference. In 1969 the amount of the loan was increased to $160,000.

The deeds of trust contain two critical typewritten provisions. First, paragraph 6 provides that "[t]rustor shall be liable for and agrees to pay any deficiency."

Second, paragraph 12 explicitly states:

> The undersigned further agrees that, pursuant to Part 101 of the Rules and Regulations of the Small Business Administration, this instrument is to be construed and enforced in accordance with the applicable Federal Law. The undersigned hereby waives any local immunity from the performance of any obligation hereunder.

In February 1970, after the SBA had deferred appellees' loan payments several times, it accelerated the note and demand d payment. Appellees had then paid $3,811.15 on the loan. They requested a six month extension to enable them to make satisfactory financial arrangements. SBA agreed. When no further correspondence or payment was received the SBA exercised its statutory power of sale under the deeds of trust and Alaska law, AS § § 34.20.070–34.20.130 (1970).

The real property collateral was sold at a summary foreclosure sale on September 20, 1973. The SBA purchased two parcels and a private party the other. After the proceeds were applied to the balance of the loan there remained an unpaid debt in excess of $121,000.

The SBA brought the instant action in 1975 to recover the deficiency. The debtors moved to dismiss on the ground that recovery was barred by an Alaska statute, AS § 34.20.100 (1970), prohibiting recovery of deficiency judgments after summary foreclosure pursuant to a power of sale under a deed of trust. The district court relied upon *United States v. Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), and *United States v. MacKenzie,* 510 F.2d 39 (9th Cir. 1975) (en banc), and denied recovery by the SBA.

We believe this reliance was unwarranted because of distinguishing facts in the instant case. Each of the critical factors absent in prior cases, *i.e.,* contractual provisions, federal statute and administrative regulations, is present here and they compel an opposite result.

The government in *Yazell* was precluded by Texas' coverture law from recovering on a loan to a husband and wife where the SBA had executed on the wife's separate property. The Court was persuaded to apply state law by two important factors: (1) the individually tailored loan specifically referred to Texas law as governing and (2) there was no federal statute, regulation or contract provision which suggested that state law would be disregarded.[1]

In response to the decision in *Yazell,* administrative regulations were promulgated to avoid this problem. *See* 31 Fed.Reg. 10466 (August 4, 1966). Two of those regulations are significant here. The first provides that federal law is to be applied in construing SBA instruments.[2] 13 C.F.R. 101.1(d)(2). The second rule com-

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[1] In fact, the Supreme Court framed the issue in *Yazell* as:

> "[W]hether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right *which is not provided by statute or specific agency regulation, which was not part of its bargain,* and which requires overriding a state law dealing with the intensely local interests of family property and the protection . . . of married women."

382 U.S. at 349, 86 S.Ct. at 505 (emphasis added).

[2] 13 C.F.R. 101.1(d)(2) provides:

> "(2) Instruments evidencing a loan, obligation of security interests in real or personal property payable to or held by the Administration or the Administrator, such as promissory notes, bonds, guaranty agreements, mortgages, deeds of trust, and other evidences of debt or security shall be construed and enforced in accordance with applicable Federal law."

mands that SBA debtors shall not "be entitled to . . . assert any local immunity to defeat the obligation . . . ."[3] 13 C.F.R. 101.1(d)(4).

Our disposition in *MacKenzie* did not require us to reach those regulations. The issue there was the amount of the deficiency and the applicability of state redemption rights and not whether any deficiency recovery was possible. We subsequently have stressed that in *MacKenzie*,

> the government had not bargained for preemption of state debtor-protection policies in the absence of pertinent legislation and regulations.

United States v. Haddon Haciendas Co., 541 F.2d 777, 783-84 (9th Cir. 1976).

In *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975), we applied California's anti-deficiency provisions to bar recovery by the Veterans' Administration of a deficiency because the deed of trust specifically provided that the contract was to be construed under California law. In so holding we observed that the conscious elimination from the contract of applicable federal provisions was critical to the rights of the parties.

> [T]here is no justifiable cause or reason why the government should not be bound by the precise terms of the negotiated loan instruments . . . .

Id. at 1072.

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[3] 13 C.F.R. 101.1(d)(4) states:

> "(4) Any person, corporation, or organization that applies for and receives any benefit or assistance from SBA, or that which SBA relies for the granting of such benefit or assistance, shall not be entitled to claim or assert any local immunity to defeat the obligation such party incurred in obtaining or assuring such Federal benefit or assistance."

It is axiomatic that any interpretation of the rights and duties of the parties under a contract must begin with its terms. There is no reason why these appellees should not be bound by the inserted clauses which provide that federal law will govern, that the parties waive any local immunity, and that the "[t]rustor shall be liable for and agrees to pay any deficiency." [¶6].

Additionally, the district court read restrictively the applicable statute,[4] 15 U.S.C. § 634(b)(4), and held that no deficiency judgments are authorized when the loan is secured by a deed of trust instead of a mortgage. Our examination of the statute and its legislative history demonstrates that Congress, in this context, intended the term "mortgage" to be used in its broader, generic sense. Moreover, the differences in foreclosure methods between a mortgage and a deed of trust under Alaska law do not exist nationwide.[5]

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[4] 15 U.S.C. § 634 provides, in pertinent part:

> "(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
>
> * * * * * * *
>
> "(4) pursue to final collection, by way of compromise or otherwise, all claims against third parties assigned to the Administrator in connection with loans made by him. This shall include authority to obtain deficiency judgments or otherwise in the case of mortgages assigned to the Administrator . . ."

[5] We note that, notwithstanding the differences in foreclosure procedures, the Alaska Supreme Court has commented that:

> "A deed of trust is a 'mortgage in effect,' being only a somewhat different device for accomplishing the same purpose, creating a security interest in land."

Brand v. First Federal Savings & Loan Ass'n of Fairbanks, 478 P.2d 829, 831 (1970). *See also* AS 34.20.110 (1970), which provides that "[f]or the purposes of record, a deed of trust . . . shall be treated as a mortgage of real estate . . ."

A consistent application of the statute in all jurisdictions is necessary to effectuate the underlying Congressional goals. This requires that the SBA be allowed to recover deficiencies whenever federal law applies and there has been a default on a loan secured by real property.

In *MacKenzie* it was necessary to protect debtors "from economic overreaching in foreclosure sales." 510 F.2d at 41-42. The debtors here are not similarly vulnerable to such an occurrence because, under the applicable federal law, they could assert an unconscionably low sale price as a defense in an action to recover a deficiency. No such defense has been made by appellees here.

The three critical factors: a federal statute, agency regulations and, most importantly, explicit contractual provisions authorizing SBA to recover the deficiency are all present here.

Reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOWARD GISH and
JACQUELYN GISH, his wife,
Defendants.

No. F-75-26 Civil

MEMORANDUM, JUDGMENT, AND ORDER OF DISMISSAL

THIS CAUSE comes before the court upon the defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Since the court has considered the supporting affidavit and exhibits attached thereto, the court will treat the motion as one for summary judgment. Further, the request for oral argument is denied in order to expedite the business of the court. See Local Rule 35F.

After consideration of the arguments advanced and the authorities cited the court finds that a deficiency judgment would be barred by the principles enunciated in *United States v. Yazell*, 382 U.S. 341 (1960) as interpreted and applied in *United States v. MacKenzie*, 510 F.2d 39 (9th Cir. 1975), *en banc. See also, United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975), *Weinstein v. United States*, 511 F.2d 56 (6th Cir. 1975). While

there are undoubtedly differences between the aforementioned cases and the instant action, the court finds that three points exist that are similar and which therefore bring the facts of this case within the rationale of *MacKenzie*.

First, as the parties have knowledge, the S.B.A. could have proceeded by foreclosure and recovered any deficiency. *See*, A.S.09.45.170. Accordingly, there does not have to be any danger to the federal fisc. Second, there does not appear to be any federal statutory authority for the recovery of deficiency judgments by the S.B.A. where the debt is secured by a deed of trust. Third, A.S.34.20.100 is clear in its mandate that a deficiency judgment shall not be allowed where the trustee takes advantage of the expedited procedure established by A.S.34.20.70-.130.

Further, the court finds, as a matter of state law, that the provisions of A.S. 34.20.100 may not be waived as they embody a critical legislative determination that debtors, as a class, need the protection afforded by A.S. 34.20.100. In view of the court's holding that A.S. 34.20.100 may not be waived, the court finds that the language in section six of the deed of trust purporting to be such a waiver is ineffective for that purpose. To the extent that federal law would allow such a waiver there exists no overriding federal interest that requires that the state interest in protecting its citizens be subordinate. As stated earlier, the S.B.A. could have followed the applicable state procedures and obtained a deficiency judgment.

Accordingly, IT IS ORDERED AND ADJUDGED:

1. THAT the defendants are granted summary judgment;

2. THAT this action is dismissed.

DATED at Anchorage, Alaska, this 20th day of July, 1976.

/s/ James A. von der Heydt
James A. von der Heydt
United States District Judge

cc: U. S. Attorney
James D. DeWitt